UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

SAIGON GOURMET RETAURANT, INC. AND SAIGON SPICE, INC., a SINGLE EMPLOYER d/b/a SAIGON GRILL RESTAURANT

And **Case No. 2-CA-38252**

318 RESTAURANT WORKERS UNION

Jaime Rucker, Esq., Counsel for the General Counsel
S. Michael Weisberg, Esq., Counsel for the Respondent
Yvonne Brown, Esq., Counsel for the Union

DECISION

Statement of the Case

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York on December 3, 5 and 6, 2007. The charge and the amended charge were filed on May 14 and July 30, 2007. A Complaint was issued on September 28, 2007 and an Amended Complaint was issued on November 8, 2007. The amended Complaint alleged as follows:

1. That Saigon Gourmet Restaurant, Inc., and Saigon Spice Inc., constitute a single employer within the meaning of the Act.

2. That on or about March 2, 2007, the Respondent by Simon Nget, its Owner, **(a)** interrogated employees about their union and protected concerted activities, **(b**) promised to raise wages if employees agreed to cease engaging in union activities and **(c)** threatened to close the delivery department and discharge those employees in retaliation for their union activities.

3. That on or about March 3, 2007, the Respondent by Simon Nget, **(a)** promised to raise employee wages, **(b)** told employees that their activities were futile and **(c)** interrogated employees about their union and protected concerted activities.

4. That on or about March 3, 2007, the Respondent discharged all of its delivery employees employed at 620 Amsterdam Avenue, because they signed a document authorizing a wage and hour lawsuit. It is further alleged that Respondent ceased operating its delivery service at this location on this date.

5. That on or about March 5, 2007, the Respondent discharged all of its delivery employees employed at 93 University Place, because they either signed a document authorizing a wage and hour lawsuit or because they engaged in other concerted activity or

because they engaged in union activity. It is further alleged that Respondent ceased operating its delivery service at this location on this date.

6. That on various dates after March 30, 2007, the Respondent by Simon Nget, Leanna Nget, a manager, and by persons named Timmy and Kenny, engaged in video surveillance of the picketing activity of its employees.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following [1]

I. Jurisdiction

It is undisputed that the two restaurants in question meet the Board's retail standards for asserting jurisdiction. I therefore conclude that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The two restaurants in question are solely owned by Simin Nget. He is also the sole officer and shareholder. One of the restaurants is located at 620 Amsterdam Avenue and the other is located at 93 University Place. Both are in Manhattan. Mr. Nget is the person who does the hiring and firing and he sets wages and other employment policies at both locations. The evidence also shows that there is some degree of interchange between the two locations, with some employees working at both.

Although each restaurant is a separate corporation, the evidence shows that that there is common ownership, common management and common control of labor relations. As such, I conclude that for purposes of the National Labor Relations Act the two constitute a single employer. *Lihli Fashions v NLRB,* 151 LRRM 2943 (2nd Cir. 1996) and *Flat Dog Productions, Inc*., 347 NLRB No. 104 (2006).

The Restaurant at Amsterdam Avenue employed about 22 delivery persons in addition to a larger complement of kitchen and server employees. The restaurant at University Place employed about 6 delivery people. From the inception of these operations, the Employer has provided sit-down, take-out and food delivery services. For the most part, the delivery people utilize their own bicycles and work from about noon to around 9 or 10 p.m. Their income normally is derived from tips, but they are also paid a small sum for each shift. I am not here to decide or discuss whether these employees received the appropriate legal minimum for tipped employees. Nevertheless, there is no question that employees talked about this subject and were not happy with their incomes.

There was some evidence that this Union had undertaken organizational activities among other Chinese or Asian restaurants in Manhattan and that there was some coverage of this in Chinese language papers. But to say, as the General Counsel argues, that Mr. Nget was therefore aware of any union organizational efforts at his restaurant is speculative at best.

On February 28, 2007, a number of the employees signed union authorization cards. At the same time they also signed authorizations to participate in a wage and hour law suit against

[1] I hereby grant the General Counsel's unopposed motion to correct the Record.

Saigon Grill. There is no evidence to show that the Employer, before its decision to discharge the delivery employees, became aware of their union support. But the wage and hour matter was an entirely different story.

It is essentially admitted that on May 2, 2007, two employees approached Nget and requested/demanded that the pay of the delivery employees be increased and that unless this was done he would be sued. It also is clear that Nget understood that he was being threatened with a lawsuit concerning the alleged failure of his restaurants to meet the minimum wage requirements. He thereupon decided to call a meeting with the delivery employees who worked at the Amsterdam location and tried to dissuade them from filing a lawsuit. In substance, he offered them an extra $5 per shift. This offer was rejected.

Although the Respondent asserted, (without really offering any proof), that the delivery service was not profitable and would have been terminated in any event, the testimony of Nget establishes that had the employees accepted the extra $5 per shift and dropped the idea of suing him about wages, he would have continued the delivery service. In this regard, I also note that the delivery operation has always been an integral part of Nget's business from the opening of his restaurants.

In any event, after the conclusion of the meeting, Nget decided to terminate the delivery service at both restaurants and by March 4 effectuated that decision and notified all of the delivery people that their services were no longer needed.

Following the cessation of the delivery service, the employees, in conjunction with the Union set up a picket line. It is admitted that during the course of the picketing, Nget, on various occasions, had the picketers videotaped. While asserting that this was done in relation to alleged picket line misconduct, the Respondent failed to adequately offer any proof to support that assertion.

III. Analysis

Although the General Counsel argues that one of the motivations for the discharge of the delivery drivers was because they signed union authorization cards or expressed their support for the Union, there is no objective evidence that convinces me that **(a)** the Respondent was aware of this activity or **(b)** that his decision to terminate the delivery service was motivated by union activity. Further, I do not conclude that the Respondent's promise of $5 extra per shift was related to his fear that the employees were seeking unionization. Nor do I conclude that the Respondent coercively interrogated employees about their union membership or activities or that he threatened employees with plant closure because of their union membership or activities.

Nevertheless, Section 7 of the National Labor Relations Act, not only protects union activity it also protects concerted activity for "mutual aid and protection." And the case law, establishes that the actions of employees to prepare for the filing of a lawsuit under the Fair Labor Standards Act, is concerted activity as that term is defined in Section 7. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-578 and n. 15 (1978); *Igramo Enterprise Inc*. 351 NLRB No. 99 (2008*.); U Ocean Palace Pavilion, Inc.*, 345 NLRB 1162 (2005); and *Kysor Industrial Corp*., 309 NLRB 237, (1992). The Supreme Court made it clear in *Eastex* that pursuant to Secton 7 of the Act, employees are protected from discharge or other retaliation for their concerted actions in seeking to improve their working conditions through "resort to administrative and judicial forums" and through "appeals to legislators to protect their interests as employees."

Accordingly, as it is my conclusion that the Respondent decided to discharge all of its delivery employees because he believed that at least some of them would initiate a lawsuit claiming wages under the Fair Labor Standards Act, I find that these discharges impinged on the protection afforded to employees under Section 7 of the Act and therefore violated Section 8(a)(1) of the Act. [2]

I also conclude that the videotaping of employees constituted a violation of 8(a)(1) of the Act. Thus, in *F.W. Woolworth Co*., 310 NLRB 1197, (1993), in finding a violation of Section 8(a)(1), the Board, with member Oviatt dissenting, stated:

> As the judge recognized, the Board has long held that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate. *Waco, Inc*., 273 NLRB 746, 747 (1984)…. Here the record provides no basis for the Respondent reasonably to have anticipated misconduct by those handbilling, and there is no evidence that misconduct did, in fact, occur. Unlike our dissenting colleague, we adhere to the principle that photographing in the mere belief that "something 'might' happen does not justify Respondent's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity."

Conclusions of Law

1. By terminating its delivery service and discharging all of its delivery employees, because the Respondent believed that these employees intended to file a lawsuit under the Fair Labor Standards Act, the Respondent has violated Section 8(a)(1) of the Act.

2. By videotaping employees who engaged in peaceful picketing activity, the Respondent has violated Section 8(a)(1) of the act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6) & (7) of the Act.

4. The Respondent has not violated the Act in any other manner.

Remedy

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[2] In my opinion, the termination of the delivery service and the consequent discharge of the delivery employees is not encompassed by *Textile Workers Union of America v. Darlington Mfg. Co*., 380 U.S. 263 (1965) or its progeny. Darlington established the proposition that an Employer can close its entire business without violating the Act even if motivated by unlawful reasons. The court also stated that an employer could be held liable in a situation where it partially closed its operations if that action chilled unionization elsewhere. For one thing, I don't think that the facts in this case amount to a partial closing as that term has been used in *Darlington* or other cases where an employer permanently closed a plant or terminated a separate business operation. For another, since the delivery employees worked in close proximity to the restaurant's other employees, their discharge for concerted activities, would necessarily deter those other employees from seeking redress for any other violations of minimum wage or other labor laws. *Cub Branch Mining*, 300 NLRB 57, 59 n.20 (1990). See also *George Lithograph Co*., 204 NLRB 431 (1973), where the Board concluded that the closing of a mailing division for anti-union reasons, would necessarily act as a deterrent to the exercise of Section 7 rights by other employees who worked in the same building and who operated under the same immediate management.

Having found that the Respondent has engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel seeks *inter alia*, an Order requiring the Respondent to reinstate all of the delivery employees who were discharged on March 3 and 4, 2007. This would require the Respondent to reinstate its delivery service operations.

In *We Can Inc*., 315 NLRB 179 (1994), the Board stated:

> When an employer has curtailed operations and discharged employees for discriminatory reasons, the Board's usual practice is to order a return to the status quo ante - that is, to require the employer to reinstate the employees and restore the operations as they existed before the discrimination - unless the employer can show that such a remedy would be unduly burdensome. [3]

As there is no capital equipment or other investment that would be required to restore the delivery service, it could hardly be said that a restoration remedy would be unduly burdensome.

It may be that a restored delivery service might not be profitable if the employees are reinstated under terms that are in compliance with various federal and state employment laws. [4] But as of now, this is purely speculative and nothing in this recommended Order would compel the Employer to continue to operate this service on a loss basis. If the future operation of a delivery service under these new conditions is ultimately not feasible, then the Employer may discontinue it so long as its decision is not based on illegal considerations.

In *We Can, Inc*., supra, the Board, although refusing to reopen the record, did amend the Administrative Law Judge's recommended Order to provide that restoration and reinstatement would be required "unless the Respondent can establish at compliance - on the basis of evidence that was not available at the time of the unfair labor practice hearing - that those remedies are inappropriate." See also *Ferragon Corp*., 318 NLRB 359 (1995).

In view of the above, I shall recommend that the Respondent, having discriminatorily discharged employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the dates of discharge to the date of proper offers of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (2987). I shall further recommend that the delivery service be restored. Although I can see no present basis for failing to restore the delivery service operation, I shall recommend that the Respondent be allowed at the Compliance stage of the proceedings, to try to establish, based on new evidence that the restoration of this operation would not be feasible.

As the Respondent's employees are largely Chinese speaking, it is recommended that the Notices be in Chinese and English.

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[3] See also *Ferragon Corp*., 318 NLRB No. 37 (1995).

[4] Among the laws applicable to employees are those relating to (1) minimum wages and overtime (2) workers compensation; (3) federal and state income tax, and (4) social security.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [5]

ORDER

The Respondent, Saigon Grill Restaurant Inc., and Saigon Spice Inc., d/b/a Saigon Grill Restaurant, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging employees because of their concerted activity of indicating their intention to file a lawsuit under the Fair Labor Standards Act.

(b) Videotaping employees who are engaged in peaceful picketing.

(c) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer the delivery employees full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against the delivery employees and within three days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in New York, New York, copies of the attached notice marked "Appendix." [6] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since March 3, 2007.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., February 11, 2008.

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Raymond P. Green
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our delivery employees because of their concerted actions in seeking to enforce by way of a lawsuit, the Fair Labor Standards Act.

WE WILL NOT videotape employees who are engaged in peaceful picketing.

WE WILL NOT in any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL restore the delivery operation and reinstate the delivery employees who have been found to have been illegally discharged, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL make whole the delivery employees, for the loss of earnings they suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful discharges and notify the employees in question, in writing, that this has been done and that these actions will not be used against them in any way.

SAIGON GOURMET RESTAURANT, INC. and SAIGON SPICE, INC. d/b/a SAIGON GRILL RESTAURANT
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614
New York, New York 10278-0104
Hours: 8:45 a.m. to 5:15 p.m.
212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.